STATE OF MICHIGAN

COURT OF APPEALS

MAGDALENA PREDETEANU,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellee,

and

CEMCARE, INC.,

Defendant.

UNPUBLISHED
September 12, 2006

No. 267718
Oakland Circuit Court
LC No. 2003-053509-CK

Before: Jansen, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm in part and reverse in part.

Summary disposition decisions are reviewed de novo on appeal, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). When examining a motion for summary disposition based on MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Plaintiff filed a two-count complaint against defendant insurance company alleging breach of contract and violation of MCL 500.2006, the statute addressing penalty interest for

failing to timely pay an insurance claim. Specifically, plaintiff alleged that she insured her home with defendant, and she suffered a loss defined within the terms of the policy. Despite the fact that the premiums were paid and current at the time of the loss, defendant allegedly refused to make payment after plaintiff submitted a sworn statement of proof of loss following a discharge of water in her basement.

Defendant moved for summary disposition based on MCR 2.116(C)(10),[1] alleging that the loss was not governed by the terms of the policy because mold damages were expressly excluded. Defendant also asserted that penalty interest was not appropriate when a claim was reasonably in dispute. In response, plaintiff alleged that a loss occurred when a water supply line attached to the humidifier burst and flooded the basement. Defendant allegedly recommended a company[2] to remedy the problems caused by the separation of the water supply line. Plaintiff alleged that after the company left the premises, an independent assessment concluded that there were problems with the premises, which included air quality issues. Plaintiff further alleged that defendant's own remediation contractor, Independent Air Quality Management (IAQ), also concluded that there was claim related coverage, but IAQ later revised its opinion, and defendant denied coverage. Based on the above and the affidavit of an expert public adjuster, Henry Orr, plaintiff alleged that factual issues existed that prevented summary disposition, particularly in light of the fact that a portion of her claim was for non-mold related water damage. Plaintiff also alleged that mold damage was covered within the terms of the policy because mold qualified as a "pollutant." Lastly, plaintiff alleged that she was entitled to the statutory penalty because the claim was not reasonably in dispute when defendant's own expert, IAQ, preliminarily reported that some portions of the loss were covered by the policy. The trial court granted the defense motion for summary disposition without addressing plaintiff's characterization of mold and non-mold related claims, and also denied plaintiff's motion for reconsideration. Plaintiff appeals as of right.

Plaintiff first alleges that the trial court erred in granting defendant's motion for summary disposition with regard to the claim for water damages. We agree. Review of the record reveals that there were preliminary indications that the claim involving the humidifier was a covered loss within the terms of the policy. Defendant's remediation contractor concluded that there were items that fell within the terms of the policy. Plaintiff also presented an affidavit from her own expert indicating that there was damage to the home as a result of the water incident. Defendant alleges that the preliminary report from its contractor was flawed because plaintiff refused to participate in the investigation. However, it is not the province of the appellate courts to resolve issues of fact, rather that task falls within the province of the jury. *Ghrist v Chrysler Corp*, 451

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[1] We note that the complaint did not describe the type of loss at issue in any specific detail. That is, the complaint did not allege whether the loss involved water damage or mold damage. It merely alleged that a loss defined within the terms of the policy occurred. Defendant did not move for summary disposition based on MCR 2.116(C)(8) and challenge the sufficiency of the pleadings.

[2] Plaintiff also filed suit against this company, Cemcare, Inc., but the company was dismissed in the lower court and is not a party to this appeal.

Mich 242, 249 n 13; 547 NW2d 272 (1996). In light of the evidence submitted, a genuine issue of material fact was presented, and the trial court erred in dismissing plaintiff's claim to the extent that she raised allegations of loss within the terms of the policy based on water damage.

Plaintiff next alleges that the trial court erred in granting summary disposition of the mold damage claim based on the language of the insurance policy. We disagree. An insurance contract must be examined and read as a whole with meaning given to all terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 50 n 11; 664 NW2d 776 (2003). If a clear contract does not contravene public policy, the contract will be enforced as written, even if inartfully worded or clumsily arranged. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). An ambiguity is not created when a word is not defined in the contract. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992).

In *Hayley v Allstate Ins Co*, 262 Mich App 571, 575-576; 686 NW2d 273 (2004), this Court upheld exclusions from policy coverage for mold damages even if it could be argued that the damage was the result of two or more causes of loss, also known as the concurrent cause exclusion. Plaintiff asserts that the *Hayley* decision is not binding on this panel because there is a distinction between "damages caused by mold and losses consisting of mold damage." Plaintiff's argument is merely an exercise in semantics, and an exercise in semantics does not preclude the grant of summary disposition. *Camden v Kaufman*, 240 Mich App 389, 397; 613 NW2d 335 (2000). In the present case, the plain language of the exclusion contains similar concurrent cause exclusion language. Specifically, it provides that "We do not cover loss to covered property caused directly or indirectly by any of the following, whether or not any other cause or event contributes concurrently or in any sequence to the loss … rust, corrosion, or electrolysis, mold or mildew, or wet or dry rot." The express language of this policy excludes coverage for mold regardless of whether or not there was another contributing cause; it is designed to eliminate the argument that before there was mold damage, there was water or dampness that caused the mold.

To avoid the concurrent exclusion language, plaintiff raises a different argument, specifically that the policy will cover pollutants that are the result of water damage. Plaintiff alleges that the policy is ambiguous because mold can be classified as a pollutant. Therefore, an ambiguity has been created that must be construed in favor of plaintiff, the insured. However, the fact that a policy does not define a term does not render the policy ambiguous, *Rednour v Hastings Mut Ins Co*, 468 Mich 241, 251 n 5; 661 NW2d 562 (2003), and the rule of contra proferentem (ambiguity rule) is a rule of last resort that does not apply unless there is a true ambiguity when the parties' intent cannot be discerned, *Twichel v MIC Gen Ins Co*, 469 Mich 524, 535 n 6; 676 NW2d 616 (2004).

The policy at issue defines "pollutants" as: "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, liquids, gases and waste. Waste includes materials to be recycled, reconditioned or reclaimed." However, plaintiff does not provide the definition of "mold" and indicate whether or not "mold" can be classified as a "pollutant." Rather, plaintiff concludes that "mold clearly falls within the dictionary definition of a 'contaminant' because 'contaminate' is defined in the dictionary as 'to soil, stain or infect by contact or association.'" However, Random House Webster's College Dictionary (2000) defines "mold" as "a growth of minute fungi forming on vegetable or animal matter, commonly as a downy or furry coating, and associated with decay or dampness" or "any of the fungi that

produce such a growth; mildew." Thus, "mold" is a "growth of fungi" and growth of fungi is not a listed "pollutant" as defined in the policy. Plaintiff ignores the definition of "mold" completely and rather uses the term "contaminate" without examining whether "mold" qualifies as a "contaminant." Moreover, it should be noted that the policy defines what is included as a pollutant, it does not state that it is "included, but not limited to…" Thus, plaintiff cannot expand the definition of the term "pollutant" to cover items for which the insurance company did not issue insurance coverage. Accordingly, the trial court correctly granted summary disposition in favor of defendant with regard to claims for mold or pollutant damage.

Lastly, plaintiff alleges that the trial court erred in granting summary disposition of the claim for penalty interest based on MCL 500.2006. However, MCL 500.2006(1) provides that the failure to pay a claim on a timely basis is an unfair trade practice "unless the claim is reasonably in dispute." Review of the evidence in this case reveals that plaintiff had issues with water damage dating back to the 1980s. Moreover, plaintiff suffered a loss in June 2001, but defendant determined that the loss was not included based on the terms of the policy. Defendant continues to assert that any injury suffered by plaintiff was the result of water incidents caused by the condition of the home and the need for repairs. It is alleged that the water damage can be examined to conclude whether they are the result of new damage or an old stain. Consequently, the trial court did not err in concluding that the claim was reasonably in dispute.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ William B. Murphy
/s/ Karen M. Fort Hood